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Questions Most Frequently Asked About

The Sentencing Guidelines

**United States Sentencing Commission
Washington, D.C.**

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Disclaimer: Information provided by the Commission's Training Staff is offered to assist in understanding and applying the sentencing guidelines. The information does not necessarily represent the official position of the Commission, should not be considered definitive, and is not binding upon the Commission, the court, or the parties in any case.

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1. **QUESTION:** Do the Guidelines apply when sentencing individuals as juveniles?

ANSWER: No.

2. **QUESTION:** Can home detention (house arrest) be substituted for imprisonment?

ANSWER: Yes. As of November 1, 1989, home detention (house arrest) may be substituted for imprisonment when imposing a term of probation or supervised release as described under §5C1.1. As indicated in §5C1.1(e), one day of home detention is a substitute for one day of imprisonment. Home detention may be imposed as a condition of probation or supervised release, but only as a substitute for imprisonment, not simply as a more limiting condition of probation or supervised release. (See §5F1.2.)

Application Note 1 to §5B1.4 indicates that, "[u]nder home detention, the defendant, with specified exceptions, is restricted to his place of residence during all non-working hours. Curfew, which limits the defendant to his place of residence during evening and nighttime hours, is less restrictive than home detention and may be imposed as a condition of probation whether or not imprisonment could have been ordered."

3. **QUESTION:** Do the guidelines permit "unsupervised" probation?

ANSWER: Yes. Supervision is not a mandatory condition of probation listed under §5B1.3. Recommended conditions of probation are included in a policy statement at §5B1.4. The recommended conditions are generally those that address reporting and necessitate supervision. While the conditions listed in §5B1.4 are recommended, they are not required.

4. **QUESTION:** What should be done if the guideline range is below a statutory minimum mandatory sentence or above a statutory maximum?

ANSWER: If the guideline range is below a statutory minimum mandatory sentence, the statutory minimum is controlling and becomes the guideline sentence. If the guideline range is above a statutory maximum, the statutory maximum is controlling and becomes the guideline sentence. (See §5G1.1.)

5. **QUESTION:** What should be done when a statute mandates a consecutive sentence?

ANSWER: According to §5G1.2, this sentence should be imposed consecutively to any other guideline sentence. If a mandatory term is required, e.g., 18 U.S.C. § 924(c) (use of a firearm in a crime of violence), the mandatory term would run consecutively to the guideline term for the remainder of the offenses. For offenses where a consecutive sentence is mandated but a specific term is not statutorily mandated, e.g., 18 U.S.C. § 3146 (failure to appear), independent guideline calculations should be made for that offense and the sentence should be imposed to run consecutively to the guideline sentence for the remainder of the offenses. (See §3D1.1(b) and Application Note 1 to §3D1.1.)

In order to avoid double counting, when a consecutive sentence is statutorily mandated for a count, any offense elements that are addressed in this count should not be factored as a specific offense characteristic or adjustment to other guideline offenses. Example: A defendant is convicted of one count of bank robbery where a weapon was used, and one count of use of

a firearm in the commission of a crime of violence (18 U.S.C. § 924(c)). The computation of the offense level for the robbery includes a specific offense characteristic involving weapons and firearms. (See §2B3.1(b)(2).) Because this behavior will be sanctioned by the imposition of a consecutive sentence for the 924(c) violation, the specific offense characteristic would not be included in the computation of the robbery guideline.

6. **QUESTION:** When calculating criminal history points, does work release count as imprisonment?

ANSWER: If the offender was sentenced to imprisonment and as part of the term of imprisonment was placed on work release status, this would be treated as a sentence of imprisonment. If the sentence did not involve a term of imprisonment (e.g., a sentence of probation with a condition requiring residency in a halfway house), the sentence would not be considered imprisonment and would fall under §4A1.1(c). A sentence of residency in a halfway house is not considered imprisonment. (See the Background of the Commentary to §4A1.1 (second paragraph).)

7. **QUESTION:** Do the time periods that apply to criminal history calculations also apply to career offender determinations?

ANSWER: Yes. Application Note 4 under §4B1.2 indicates that the applicable time periods provision of §4A1.2(e) also applies to the counting of convictions under §4B1.1 (Career Offender).

8. **QUESTION:** What should be done if the statute of conviction is not listed in the Statutory Index?

ANSWER: Appendix A (the Statutory Index) refers to §2X5.1 for offenses not listed in the index. Guideline 2X5.1 states that if the offense is a felony or a Class A misdemeanor, the most analogous guideline should be applied. In determining the most analogous guideline, the court should consider the conduct for which the defendant was convicted (§1B1.2(a)) and the statute(s) that the potentially analogous guidelines reflect. (See Statutory Provisions listed under each offense guideline.)

If no sufficiently analogous guideline exists for the felony or Class A misdemeanor, the provisions of 18 U.S.C. § 3553(b) shall control. Class B and C misdemeanors and infractions are excluded from sentencing under the guidelines effective June 15, 1988.

9. **QUESTION:** Do the guidelines apply to cases prosecuted under the Assimilative Crimes Act?

ANSWER: Yes. Refer to §2X5.1, which states that if the offense is a felony or a Class A misdemeanor, the most analogous guideline should be applied. If no sufficiently analogous guideline exists for the felony or Class A misdemeanor, the provisions of 18 U.S.C. § 3553(b) shall control. Class B and C misdemeanors and infractions are excluded from sentencing under the guidelines.

Section 1602 of the Crime Control Act of 1990 amended 18 U.S.C. § 3551(a) to expressly provide that the statutory sentencing provisions in Chapter 227 of title 18 and, therefore, the sentencing guidelines, apply to Assimilative Crimes (*i.e.*, offenses assimilated under 18 U.S.C. § 13) and Major Indian Crimes (*i.e.*, offenses assimilated under 18 U.S.C. § 1153). This provision appears to clarify and buttress Congressional intent that these offenses be sentenced in accord with the Sentencing Reform Act to the extent permitted by maximum and minimum penalty terms of state law. Prior to the 1990 statutory amendments, most appellate courts had so held. See *United States v. Garcia*, 893 F.2d 250 (10th Cir. 1989), *cert denied*, 110 S.Ct. 1792 (1990) (guidelines apply to Assimilative Crimes); *United States v. Leake*, 908 F.2d 550 (9th Cir. 1990) (same); *United States v. Young*, _____ F.2d _____, No. 89-5016 (4th Cir. 1990) (same); *United States v. Norquay*, 905 F.2d 1157 (8th Cir. 1990) (guidelines apply to Major Indian Crimes). But see *United States v. Bear*, _____ F.2d _____, No. 89-30200 (9th Cir. 1990) (guidelines do not apply to Major Indian Crimes).

10. **QUESTION:** If the offender is indicted for possession with intent to distribute, but is only convicted of simple possession, does the amount of drugs affect the sentence?

ANSWER: The guideline section utilized to compute the guideline range must be determined by the offense of conviction (§1B1.2(a)). Except for possession of cocaine base (crack), the simple possession guideline (§2D2.1) does not utilize the amount of drugs to determine the appropriate offense level. Of course, the amount of drugs may be considered by the court for the purposes of determining the appropriate sentence within the guideline range or for possible departure.

11. **QUESTION:** If the defendant is indicted on a drug conspiracy charge and multiple substantive counts of drug distribution and pleads to only one substantive count, are the amounts of drugs from the conspiracy and other substantive counts added to the drugs in the count of conviction for purposes of guideline calculation?

ANSWER: Yes, if they meet the criteria for relevant conduct under §1B1.3 and are supported by sufficient evidence (which appears to be a "preponderance of the evidence" standard). Guideline 1B1.3(a)(2) states that when considering offenses of a character that would require grouping of multiple counts under the aggregation principles of §3D1.2(d), the court should look to "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." Application Note 2 to §1B1.3 clarifies that application of subsection (a)(2), which references the types of offenses described in §3D1.2(d), does not require the defendant to have been convicted of multiple counts. In addition, the Background notes to §1B1.3 state that "conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range," provided it is within the parameters of relevant conduct.

12. **QUESTION:** If multiple defendants are convicted of drug conspiracy, are all the drugs in the conspiracy used in calculating the guideline ranges for all defendants?

ANSWER: It depends. Application Note 1 to §1B1.3 (Relevant Conduct), instructs the court to include conduct of others "in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant." Thus, the amount of drugs used

in calculating the guideline range for each defendant may vary accordingly. The note further states that "Where it is established that the conduct was neither within the scope of the defendant's agreement, nor was reasonably foreseeable in connection with the criminal activity the defendant agreed to jointly undertake, such conduct is not included in establishing the defendant's offense level under this guideline." (See illustrations C, D, and E under Application Note 1 to §1B1.3.)

13. **QUESTION:** If an indictment includes separate counts under pre-guideline law and post-guideline law, how should the defendant be sentenced?

ANSWER: The Sentencing Reform Act of 1987, passed on December 7, 1987, (Public Law 100-182), included a provision that the guidelines apply to offenses occurring on or after November 1, 1987. The pre-guideline counts would therefore be sentenced under pre-guideline provisions and counts that pertain to offenses occurring on or after November 1, 1987, would be sentenced under the guidelines.

Relevant conduct for offenses subject to the guidelines is to be determined without regard to the November 1 implementation date. If the relevant conduct for an offense committed on or after November 1, 1987, overlaps with conduct sanctioned as part of a pre-November 1 count, there would be a potential for double counting unless the pre-guideline counts were sentenced concurrently. The court will have to carefully fashion the sentence with these concerns in mind.

14. **QUESTION:** If the court does not impose a fine, is it a departure?

ANSWER: The answer depends on the defendant's ability to pay a fine. If a defendant has the ability to pay a fine but one was not imposed, the sentence would be a departure. However, if the fine was waived due to an inability to pay, the sentence would not be a departure. The guidelines require a fine in every case unless the defendant demonstrates an inability to pay or that imposition of a fine would unduly burden the defendant's dependents. In such a case the court may impose a lesser fine or waive the fine. (See §5E1.2(f).)

Application Note 3 to §5E1.2 instructs that the calculation of the guideline fine range may be dispensed with entirely upon a court determination that the defendant is unable and is unlikely to become able to pay any fine. Similarly, where the defendant is able to pay a fine within the guideline range set forth in the fine table, but is unable and is unlikely to become able to pay more than the maximum fine set forth in the fine table, calculation of the alternative maximum fines (twice the gross pecuniary loss and three times the gross pecuniary gain) may be dispensed with entirely.

15. **QUESTION:** Upon revocation of probation or supervised release, how does the court impose sentence?

ANSWER: Effective November 1, 1990, the Commission promulgated a new Chapter Seven of the Guidelines Manual containing detailed Policy Statements for violations and revocation of probation and supervised release. According to 18 U.S.C. § 3553(a)(5), the court is required to consider any applicable policy statements issued by the Commission when imposing sentence.

16. **QUESTION:** Can the court impose the maximum statutory sentence for an offense and also impose a term of supervised release?

ANSWER: Yes. When Congress abolished parole and created supervised release (18 U.S.C. § 3583), a term of supervised release was intended as separate from, and in addition to, the statutory maximum penalty for the offense. It is possible, therefore, for a defendant to be sentenced to the statutory maximum term of imprisonment for the offense and after release be subject to further imprisonment if supervised release is revoked. Supervised release is analogous to former provisions providing for a "special parole term" following imprisonment for a drug trafficking offense.

17. **QUESTION:** If the instant offense is the basis for revocation of a term of probation previously imposed, is the revocation sentence factored into the defendant's criminal history score?

ANSWER: Yes. Points are allocated based on the original sentence combined with any sentence resulting from the revocation. A good rule of thumb is that each conviction is given only one set of criminal history points.

18. **QUESTION:** What is the current definition of a petty offense?

ANSWER: Section 7089 of the Anti-Drug Abuse Act of 1988 revised the definition of petty offense so that it no longer exactly corresponds with Class B or C misdemeanors or infractions. Under the revised definition, a Class B or C misdemeanor or infraction that does not provide for a fine in excess of \$5,000 for an individual and \$10,000 for a corporation is considered a petty offense. (See Appendix C, Amendment 81.)

19. **QUESTION:** Are Class B and C misdemeanors and infractions subject to the guidelines?

ANSWER: No. Effective June 15, 1988, all Class B and C misdemeanors and infractions (offenses that include -- but are not limited to -- petty offenses) are not subject to the guidelines. (See §1B1.9 (Class B and C Misdemeanors and Infractions).)

20. **QUESTION:** When must a judge state a reason for a sentence within the guideline range?

ANSWER: In every case. Title 18 U.S.C. § 3553(c)(1), as amended by Section 17 of the Sentencing Act of 1987, states, "The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range..." (emphasis added)

Thus, it appears that (1) the court must always state its reasons for imposing the particular sentence, and (2) if the range exceeds 24 months, must also state a reason for imposing the sentence at a particular point in the range.

21. **QUESTION:** Can a career offender receive a 2-level reduction for acceptance of responsibility?

ANSWER: Yes. As of November 1, 1989, §4B1.1 (Career Offender) provides that "[i]f an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by 2 levels."

22. **QUESTION:** If the instant offense involved escape from prison (or work release), does the defendant receive 2 criminal history points for §4A1.1(d) and one more for §4A1.1(e)?

ANSWER: Yes, providing the prior sentence of imprisonment or work release from confinement is at least 60 days and is otherwise a countable sentence. The defendant receives 2 points pursuant to §4A1.1(d) for committing the instant offense while under any criminal justice sentence. Another point is received for committing the offense less than two years after release from imprisonment on a sentence of at least 60 days (§4A1.1(e)). As stated in Application Note 5, §4A1.1(e) "also applies if the defendant committed the instant offense while still in confinement on such a sentence." (See also Application Note 5 to §2P1.1).

If the escape was from a halfway house (or work release from the halfway house) and the residence is not a portion of a sentence of imprisonment of at least 60 days, the defendant would only receive 2 points under §4A1.1(d) for being under a criminal justice sentence. No points would be given for §4A1.1(e) for this prior sentence.

23. **QUESTION:** Can restitution be ordered for offenses not under Titles 18 or 49?

ANSWER: Yes. This issue has been clarified in the January 15, 1988, amendments to §5E1.1, which now states that restitution "may be ordered as a condition of probation or supervised release in any other case."

Senate Report Number 225, 98th Congress, 1st Session 95-96, indicates that restitution for other offenses is authorized by Title 18, § 3563(b)(20) as a discretionary condition.

24. **QUESTION:** Is the cost of imprisonment and supervision considered a fine?

ANSWER: Yes. The guidelines provide that the court shall order a fine within the guideline fine range and the court "shall impose an additional fine amount that is at least sufficient to pay the cost to the government of any imprisonment, probation, or supervised release ordered" (emphasis added). Of course, the guideline fine and the costs of imprisonment/supervision fine cannot total more than the maximum fine provided by statute. (See §5E1.2(i).)

25. **QUESTION:** Under the Sentencing Reform Act, how much "good time" can an inmate receive toward service of sentence?

ANSWER: For a prisoner serving a sentence of one year or less, or a life sentence, there is no good time credit available. An inmate serving a sentence of at least one year and one day

to any determinate number of years is eligible for 54 days of good time credit each year, beginning after service of the first year of the term (18 U.S.C. § 3624(b)).

26. QUESTION: What documentation should probation officers send to the U.S. Sentencing Commission?

ANSWER: As part of its effort to monitor guidelines sentencing practices, the Commission (through a memorandum dated March 7, 1988, from L. Ralph Mecham, Director of the Administrative Office) has requested the following documents from each probation office:

- 1) Guideline Worksheets submitted to the court;
- 2) Presentence Report including any addendum;
- 3) Statement of Reasons for Imposing Sentence;
- 4) Written Plea Agreement if applicable;
- 5) Judgment of Conviction.

These documents should be sent as soon as they are available, preferably within 30 days from the date of sentencing. A statement of reasons should be sent later if it is not available at the time the probation office is ready to send the other documentation.

Materials should be sent to the U.S. Sentencing Commission, 1331 Pennsylvania Avenue, N.W., Suite 1400, Washington, D.C. 20004, ATTN: Monitoring Unit.

27. QUESTION: Is a diversionary sentence based upon a plea of nolo contendere -- adjudication withheld -- considered a prior sentence for the purpose of criminal history computation?

ANSWER: Yes. Guideline 4A1.2(f) and its accompanying commentary state that a diversionary disposition, other than diversion from juvenile court, that involves a finding of guilt or admission of guilt is counted as a prior sentence under §4A1.1(c). Guideline 4A1.2(a)(1) states that a plea of nolo contendere is treated the same as a guilty plea or finding of guilt after trial for the purpose of defining the term "prior sentence." This is in accord with the Federal Rules of Criminal Procedure (see Rule 11 in particular) that generally treat a nolo contendere plea the same as a guilty plea or determination of guilt for sentencing purposes.

28. QUESTION: There appears to be a disagreement between 18 U.S.C. § 3559 and 18 U.S.C. § 3581 regarding the classification of crimes and the authorized terms of imprisonment. Which statute should we follow?

ANSWER: Section 3559 is the more relevant provision for present sentencing purposes. Subsection (a) of this section establishes the classification for sentencing purposes of each criminal offense, based upon the maximum term of imprisonment authorized in the statute(s) describing the offense. The sentencing classification (whether the offense is a Class B or C felony, for example) then determines (1) whether a sentence of probation is authorized by law (see 18 U.S.C. § 3561(a)(1)); (2) the statutory maximum fine (see 18 U.S.C. § 3571); (3) the statutory maximum term of supervised release (see 18 U.S.C. § 3583(b)); (4) the sentencing

guideline term of supervised release (see §5D1.2); and (5) the maximum term of imprisonment imposable upon revocation of supervised release (see 18 U.S.C. § 3583(e)(3)). Section 3559(b) specifically states that the maximum imprisonment term for any offense is the maximum stated in the law describing the offense (rather than the maximum listed in § 3581).

Section 3581 of title 18 is a provision of the Sentencing Reform Act that was intended to be used in conjunction with the once-planned, later-abandoned comprehensive revision of the Federal Criminal Code. Under that contemplated scheme, Congress would have graded existing crimes by sentencing classification without specifying a maximum penalty in the provisions describing the offense. Section 3581 would then have been used to determine the maximum authorized imprisonment term for each offense (e.g., an offense classified as a Class C felony would, under § 3581, have carried a maximum imprisonment of 12 years). Section 3581 remains a dormant provision because Congress, subsequent to the 1984 Sentencing Reform Act, has continued to specify maximum penalties rather than simply classifying offenses by letter grade.

29. **QUESTION:** When using the drug table, is the weight of the drug's packaging added in to determine the drug amount?

ANSWER: The footnote to the Drug Quantity Table in §2D1.1 designated by a single asterisk states that "the entire weight of any mixture or substance containing a detectable amount of the controlled substance" is to be used in determining the guideline offense level. Packaging materials are not per se a controlled substance and under the drug statutes and the guidelines are not considered to be part of a controlled substance mixture.

With respect to blotter paper, sugar cubes, or other mediums on which LSD or other controlled substances may be absorbed, the Commission has not definitively stated whether the carrier medium is considered part of a drug "mixture or substance" for guideline application purposes. In order to ensure consistency between the guidelines and the statute, Application Note 1 to §2D1.1 states that the term "mixture or substance" has the same meaning for guideline purposes as in 21 U.S.C. § 841. Thus, the court must determine whether, under this statute, LSD carrier medium would be considered part of an LSD mixture or substance. To date, all circuit courts that have addressed the issue appear to be answering the question affirmatively. See United States v. Marshall, 908 F.2d 1312 (7th Cir. 1990) (en banc); United States v. Rose, 881 F.2d 386 (7th Cir. 1989); United States v. Duly, 883 F.2d 313 (4th Cir. 1989); United States v. Taylor, 868 F.2d 125 (5th Cir. 1989); United States v. Elrod, 898 F.2d 60 (6th Cir. 1990); United States v. Bishop, 894 F.2d 981 (8th Cir. 1990) (all holding that weight of carrier medium is to be included); But see United States v. Healy, 729 F.Supp. 140 (D.D.C. 1990) (blotter paper is not a mixture or substance within the meaning of the statute).

30. **QUESTION:** If a defendant commits an offense after the instant offense but is sentenced for the subsequent offense prior to sentencing on the instant offense, can it be counted under criminal history as a prior sentence?

ANSWER: Yes. According to §4A1.2, Application Note 1, a sentence imposed after the defendant's commencement of the instant offense, but prior to sentencing on the instant offense, is a prior sentence if it was a sentence for conduct other than conduct that was part of the instant offense.

31. **QUESTION:** In computing criminal history, should a defendant whose probation term has expired but who committed the instant offense when subject to an active warrant issued for absconding from probation supervision receive 2 points under §4A1.1(d)?

ANSWER: Yes. For the purposes of §4A1.1(d), the defendant in the above example remains under a criminal justice sentence until discharged from the probationary sentence. Even though the term of probation may have expired, a defendant subject to an active warrant has not been discharged from criminal justice control.

32. **QUESTION:** Does a defendant serving unsupervised probation at the time of the instant offense receive 2 criminal history points under §4A1.1(d) for being under a criminal justice sentence?

ANSWER: Yes. Under §4A1.1(d), 2 points would be added if at the time the defendant committed the instant offense he was under a criminal justice sentence. A criminal justice sentence includes probation, as stated in Application Note 4 to §4A1.1. Keep in mind that the prior offense must meet the definition of prior sentence at §4A1.2. Whether or not the defendant was being supervised at the time of the instant offense is not a determining factor.

33. **QUESTION:** The defendant was convicted in 1984 and sentenced in state court to 20 years imprisonment. He served 90 days and was released on appeal bond, which is still pending when he commits the instant offense. Would he receive any criminal history points under §4A1.1(a)?

ANSWER: Yes. The possibility that the prior conviction may be overturned on appeal is irrelevant in application of the guidelines to the instant offense. Therefore, the defendant should receive 3 points under §4A1.1(a). Application Note 2 of §4A1.2 states that "criminal history points are based on the sentence pronounced, not the length of time actually served."

34. **QUESTION:** The defendant's instant offense is for distributing drugs. He has two prior sentences for the same type of offense, but one of the prior convictions came after he committed the instant offense. Should he be treated as a career offender?

ANSWER: No. Although the defendant may be awarded criminal history points under §4A1.1, he would not qualify as a career offender under §4B1.1. The definition of "two prior felony convictions" at §4B1.2(3) states that the defendants must have already been convicted of the prior offenses before he committed the instant offense.

35. **QUESTION:** The instant offense is bribery of a witness. The defendant bribed the witness not to testify against him in another case. Does the enhancement for obstruction of justice apply?

ANSWER: Section 3C1.1 states that the obstruction must have taken place "during the investigation or prosecution of the instant offense." For offenses covered under Part J (Offenses Involving the Administration of Justice), the Chapter Three adjustment for obstruction does not

apply unless the defendant obstructed the investigation or trial of the obstruction of justice count.

36. **QUESTION:** Does the firearm enhancement apply in a bank robbery case if the defendant used a toy gun?

ANSWER: It may. As of November 1, 1989, Application Note 2 to §2B3.1 (Robbery) states that "[w]hen an object that appeared to be a dangerous weapon was brandished, displayed, or possessed, treat the object as a dangerous weapon for the purposes of subsection (b)(2)(C)." Therefore, if the court determines that the toy gun appeared to be a dangerous weapon, the 3-level enhancement under §2B3.1(b)(2)(C) would apply.

37. **QUESTION:** A plea agreement contains several stipulations as to the amount of drugs, role in the offense, and so forth. Must the court automatically accept the stipulations as binding?

ANSWER: No. Policy Statement 6B1.4(d) states that "The court is not bound by the stipulation, but may with the aid of the presentence report, determine the facts relevant to sentencing." The commentary under §6B1.4 further instructs that in determining the factual basis for the sentence, the court will consider the stipulation, together with the results of the presentence investigation, and any other relevant information. Therefore, the probation officer should calculate the guideline sentence on the basis of all the relevant facts.

In the event of conviction by a plea of guilty or nolo contendere containing a stipulation that specifically establishes a more serious offense than the offense of conviction, §1B1.2 states that the court shall apply the guideline most applicable to the stipulated offense.

38. **QUESTION:** Fleeing from the scene of a bank robbery, the defendant crashed into another vehicle, causing extensive damage. In applying the specific offense characteristics under robbery, does the value of the automobile figure into the determination of loss?

ANSWER: Yes. Section 1B1.3(a)(1) directs that conduct relevant to determining the applicable guideline range includes all acts committed by the defendant in the course of attempting to avoid detection or responsibility for the offense. If the destruction of the car fits this criteria, the monetary damage to the car would be added to the amount of money stolen from the bank in determining the total loss under §2B3.1(b)(6).

39. **QUESTION:** A defendant was sentenced for two separate robberies on the same day in the same court and received consecutive sentences. Can each robbery be counted individually when calculating criminal history points?

ANSWER: No. Guideline 4A1.2(a)(2) states that prior sentences imposed in related cases are to be treated as one sentence for purposes of computing the criminal history score. The guideline further states that the "aggregate sentence of imprisonment imposed" should be used when consecutive sentences are imposed. Furthermore, Application Note 3 to §4A1.2 states that "cases are considered related if they (1) occurred on a single occasion; (2) were part of a single common scheme or plan; or (3) were consolidated for trial or sentencing." Thus, if the two

robbery cases were consolidated for sentencing they would be considered one sentence for the purpose of calculating criminal history.

40. **QUESTION:** During the presentence interview, the defendant provides information about his past criminal conduct for which he was never arrested. While unrelated to the instant offense, it is similar in nature. Can this information be considered in determining the defendant's criminal history category?

ANSWER: No. This activity would not be used to calculate the criminal history category. However, the court may consider such behavior as criteria for a specific point within the guideline range or as grounds for departure. *Adequacy of Criminal History* (Policy Statement 4A1.3(e)) states that the court may consider imposing a sentence that departs from the otherwise applicable guideline range if there is reliable information of "...prior similar adult criminal conduct not resulting in a criminal conviction."

41. **QUESTION:** Do the guidelines apply to conspiracies that began prior to November 1, 1987, and continued past that date?

ANSWER: The Sentencing Commission's legal staff agrees with the opinion of the Department of Justice and an opinion by legal counsel for the Administrative Office of the U.S. Courts that a defendant convicted of a continuing offense, such as a conspiracy, which began prior to November 1, 1987, but concluded after that date should be sentenced under the guidelines. It is the consensus of these opinions that such an application does not violate the *Ex Post Facto* clause of the Constitution. (See *Prosecutors Handbook on Sentencing Guidelines*, pg. 72.) (See also, "Looking at the Law," *Federal Probation*, (December 1987) that addresses this issue.)

42. **QUESTION:** Can the court depart downward and impose probation on a defendant convicted of a Class A or B felony?

ANSWER: Possibly. Under 18 U.S.C. § 3561, a defendant may not be sentenced to a term of probation if convicted of a Class A or B felony. Subsequent to the enactment of that provision in the Sentencing Reform Act of 1984, the Anti-Drug Abuse Act of 1986 added a provision codified as 18 U.S.C. § 3553(e), an amendment to Rule 35(b) of the Rules of Criminal Procedure, and a provision codified as 28 U.S.C. § 994(n). These provisions were intended to permit a defendant to have his sentence reduced upon motion of the government - even below the level of an applicable statutory minimum -- to reflect a defendant's substantial assistance in the investigation or prosecution of another offender. The legislative history is not clear as to whether Congress intended the prohibition on probation for Class A or B felonies to be treated in the same manner as a mandatory minimum term of imprisonment. Moreover, even if 18 U.S.C. § 3553(e) is interpreted by a court to permit "override" of 18 U.S.C. § 3561, there is a further question as to the authority to grant probation for some drug offenses for which the statutory language specifically prohibits a court from sentencing a defendant to probation. Thus, these are legal issues that may have to be addressed by the courts. (See, e.g., *United States v. Dzingi*, 892 F.2d 31 (4th Cir. 1989), holding that the prohibition against imposing probation for a Class A or B felony is akin to a mandatory minimum and may be overridden upon motion of the government for substantial assistance.)

43. **QUESTION:** The defendant committed the instant offense while on bond pending trial for an unrelated offense. Does the offense for which he was on bond qualify as a prior sentence in calculating criminal history points in the instant case?

ANSWER: No. Only if the defendant is sentenced for the earlier unrelated offense before sentencing for the instant offense may it be considered a prior sentence. According to Application Note 1 of §4A1.2, a sentence imposed after the defendant's commencement of the instant offense, but prior to sentencing on the instant offense, is a prior sentence if it was for conduct other than conduct that was part of the instant offense. If sentencing for the earlier behavior occurs after or in conjunction with sentencing on the instant offense, it would not be considered a prior sentence. However, irrespective of whether or not the earlier unrelated charge is a prior sentence for criminal history purposes, the court may consider the fact that the defendant was on bond as possible grounds for departure. (See §4A1.3.)

44. **QUESTION:** Is bank larceny considered a crime of violence when applying the career offender enhancement? What if the defendant actually committed bank robbery but is charged with bank larceny?

ANSWER: The career offender provision of the guidelines requires use of the offense of conviction (i.e., the statutory violation for which the defendant was convicted). Guideline 4B1.2(1) states that "[t]he term 'crime of violence' means any offense under federal or state law punishable by imprisonment for a term exceeding one year that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."

This definition is essentially identical to the definition of "violent felony" in 18 U.S.C. § 924(e)(2)(B). In determining whether a crime is a "violent felony" within the meaning of that statute, courts have focused on the elements and inherent nature of the offense as denominated by the statute, rather than on the real offense conduct. Application Note 2 to §4B1.2 lists several offenses that the Commission considers to be crimes of violence and bank larceny is not among them. However, the commentary advises that other offenses are to be considered crimes of violence "... where (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth in the count of which the defendant was convicted involved the use of explosives or, by its nature, presented a serious potential risk of physical injury to another." Thus, the court must decide whether the count of conviction meets this criteria.

45. **QUESTION:** The defendant, having met the requirements for classification as a career offender, is set for sentencing on two counts. Are the statutory maxima for the two counts added together to determine the adjusted offense level under §4B1.1?

ANSWER: No. As provided in Application Note 2 to §4B1.1, only the count carrying the greater statutory maximum is used in determining the offense level via the Offense Statutory Maximum table of §4B1.1. Note, however, that if the combined adjusted offense level for the counts determined in Chapters Two and Three is greater than that determined through the table, the combined adjusted offense level controls.

46. **QUESTION:** The defendant was convicted under a statute that requires a four year mandatory minimum term of supervised release. What is the maximum term of supervised release permitted by the guidelines?

ANSWER: According to §5D1.2(a), when a defendant is convicted under a statute that requires a minimum term of supervised release, the term shall be "at least three years but not more than five years, or the minimum period required by statute, whichever is greater." In the example cited, the minimum period required by statute (4 years) is not greater than the upper end of the guideline range. Therefore, since the court cannot impose less than the four year mandatory minimum sentence required by statute, the effective guideline range is four to five years.

47. **QUESTION:** Do the guidelines require imposition of a term of supervised release on each count when sentencing on multiple counts?

ANSWER: No. The guidelines do not require a term of supervised release on each count. According to §5D1.1, the court is required to impose a term of supervised release in conjunction with sentences of more than one year. Section 5D1.2 identifies the appropriate terms of supervised release. While the court's final sentence must be within the guideline range as determined in §5D1.2, no instructions are provided as to how the term of supervised release is to be allocated among multiple counts. The guidelines do not require nor do they prohibit imposition of a term of supervised release on each count. Note: 18 U.S.C. § 3624(e) requires that terms of supervised release imposed on more than one count run concurrently, commencing on the day the defendant is released from imprisonment.

48. **QUESTION:** The defendant faces sentencing on one count of drug distribution and one count of perjury. The perjury count involves lying on the witness stand during the trial for the drug distribution. Would these two counts be grouped together in applying the guidelines?

ANSWER: Testifying untruthfully during the drug distribution trial provides grounds for applying the obstruction enhancement (§3C1.1) when calculating the adjusted offense level for the drug count. (See §3C1.1, Application Note 1(c).) Assuming that the obstruction enhancement is applied to the drug count, the perjury count would subsequently be grouped with the drug count pursuant to §3D1.2(c). This rule calls for grouping when one of the counts embodies conduct that is treated as a specific offense characteristic in, or adjustment to, the guideline applicable to another of the counts.

49. **QUESTION:** The defendant assaulted a law enforcement officer and is convicted of 18 U.S.C. § 111. Guideline 2A2.2 (Aggravated Assault), has been applied. Is the Chapter Three adjustment for official victim (§3A1.2) applicable or has the enhancement for official victim been taken into account under §2A2.2?

ANSWER: The offense level determined through application of §2A2.2 does not include consideration of an official victim. The aggravated assault guideline (§2A2.2) was developed to cover numerous statutory provisions, including 18 U.S.C. §§ 111, 112, 113, and 114 and other statutes that do not ordinarily involve official victims. (See Statutory Provisions under

§2A2.2.) Therefore, if an official victim is involved, the enhancement at §3A1.2 would be applied.

- 50. QUESTION:** How many Worksheet A's should be used in a multiple count case?

ANSWER: As noted at the top of Worksheet A, a separate worksheet should be completed for each count of conviction or stipulated offense before applying the multiple count rules. The only exceptions to this general rule are 1) counts that are based on aggregate value or quantity that are grouped pursuant to §3D1.2(d); and 2) counts involving conspiracy, solicitation, or attempt and a substantive offense that was the sole object of the conspiracy, solicitation, or attempt. Separate worksheets should be completed for all other offenses, even though they may later be grouped together pursuant to §3D1.2(a), (b), or (c).

- 51. QUESTION:** A broadly written conspiracy count that began before November 1, 1987, and continued after that date cites the defendant for committing only pre-guideline overt acts. Must the defendant be sentenced under the guidelines?

ANSWER: Not necessarily. It is settled law that a crime that continues past the effective date of a new statute comes under the new statute. Applying that principle, the appellate courts appear to be uniformly holding that a conspiracy that continues beyond November 1, 1987, is subject to the Sentencing Reform Act and the guidelines. A more difficult question is presented in the case of a defendant who, while convicted of participation in such a conspiracy, cannot be shown to have committed any post-November 1, 1987, overt acts or otherwise to have actively participated in the conspiracy on or after that date. The general legal principle appears to be that a defendant must show that he effectively withdrew from or renounced involvement in the conspiracy in order to avoid legal accountability. Under that principle, a defendant convicted of a conspiracy that spans the November 1, 1987, guideline effective date would be sentenced under the guidelines unless the defendant withdrew or renounced the conspiracy before November 1, 1987.

- 52. QUESTION:** If the defendant is convicted of 21 U.S.C. § 843(b), use of a communications facility, but the real offense behavior included drug distribution, will relevant conduct allow the use of §2D1.1 for purposes of considering the quantity of drugs involved in the offense?

ANSWER: Yes. As of November 1, 1990, the base offense level for §2D1.6 (Use of Communication Facility in Committing Drug Offense) is determined by calculating the offense level for the underlying offense.

- 53. QUESTION:** Are the Statutory Provisions listed under each guideline inclusive?

ANSWER: No. Application Note 3 to §1B1.1 states "The list of 'Statutory Provisions' in the Commentary to each offense guideline does not necessarily include every statute covered by that guideline. In addition, some statutes may be covered by more than one guideline."

54. **QUESTION:** What is the drug equivalency for Ritalin? How are drug equivalencies for drugs not listed in the Drug Equivalency Table determined?

ANSWER: The November 1, 1989, amendments included a series of drug equivalencies that were not previously listed in the *Guidelines Manual's* drug tables. For Ritalin, also known as Methylphenidate, one gram is equivalent to 0.5 grams of cocaine or 0.1 grams of heroin. Examples of other drugs added to the table include Euphoria (Methylaminorex), Crack (Cocaine Base), and Deriden (Clusethimide). For a complete list of drugs added to the table, consult amendments #126 - #134 in Appendix C.

If a drug is not listed under §2D1.1, the probation officer handling the case should contact the Commission. Staff will consult with the Drug Enforcement Administration regarding appropriate equivalencies and forward that information to the court for its consideration.

55. **QUESTION:** A girlfriend-witness of a drug dealer perjured herself at his trial by providing him with a false alibi. The boyfriend was subsequently convicted of drug trafficking and the girlfriend of perjury. The guideline for perjury (§2J1.3) lists a cross reference instructing, "If the offense involved perjury or subornation of perjury in respect to a criminal offense, apply §2X3.1 (Accessory After the Fact) in respect to that criminal offense, if the resulting offense level is greater than that determined above." The boyfriend was convicted of cocaine trafficking in an amount that resulted in a Chapter Two offense level of 34. Would the girlfriend's offense level for the perjury conviction be 6 levels less than the boyfriend's offense level of 34?

ANSWER: Yes. According to §2X3.1, *Accessory After the Fact*, the underlying offense means "the offense as to which the defendant is convicted of being an accessory." The underlying offense in this case is drug distribution carrying an offense level of 34. Therefore, the girlfriend's offense level would be 28, 6 levels less than the boyfriend's Chapter Two offense level of 34.

56. **QUESTION:** Is there an analogous guideline for Driving While Intoxicated (DWI)?

ANSWER: No.

57. **QUESTION:** If no analogous Chapter Two guideline exists, is the court bound by the fine and supervised release guidelines?

ANSWER: Yes. Although the guidelines do not constrain the court's choice in imposing probation or imprisonment for offenses not covered by a Chapter Two guideline, the provisions of Chapter Five pertaining to imposition of a fine or special conditions of probation and supervised release are to be consulted when imposing a sentence. The Commission suggests that any guidelines and policy statements that can be applied meaningfully in the absence of a specific Chapter Two offense guideline should be applied.

58. **QUESTION:** Is it possible to group multiple counts using another rule if an offense is excluded from the §3D1.2(d) grouping rule?

ANSWER: Yes. As stated in the final sentence of §3D1.2(d), exclusion of an offense from grouping under this subsection (meaning §3D1.2(d) only) does not necessarily preclude grouping under another subsection. Grouping under any of the remaining rules (§3D1.2(a), (b) or (c)) may be appropriate. For example, convictions for Chapter Two, Part A offenses are excluded from grouping under §3D1.2(d). However, suppose a defendant is convicted of assault with intent to commit murder and assault with a dangerous weapon, both counts related to a single incident involving the same victim. These counts would appropriately be grouped under §3D1.2(a) (same act or transaction and same victim) even though they are excluded from §3D1.2(d) grouping.

59. **QUESTION:** Can the court reduce a defendant's sentence of imprisonment when a guideline has been subsequently amended by the Commission?

ANSWER: Possibly. Title 18 U.S.C. § 3582(c)(2) provides that the court may reduce the term of imprisonment of a defendant sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Commission after considering the factors set forth in 18 U.S.C. § 3553(a) to the extent they are applicable if such a reduction is consistent with applicable policy statements issued by the Commission. The Commission's policy statement in response to this provision is set forth at §1B1.10 (Retroactivity of Amended Guideline).

60. **QUESTION:** A defendant's prior two-year custody sentence was modified after service of three months imprisonment and the balance suspended with the defendant placed on three years probation. How many criminal history points should be assigned?

ANSWER: Two. Criminal history points are based upon the sentence imposed. However, if part of a sentence of imprisonment was suspended, "sentence of imprisonment" refers only to the portion that was not suspended (§4A1.2(b)(2)). In this example, the defendant served three months imprisonment before the court suspended the balance through a sentence modification. Applying §4A1.1(b), 2 criminal history points would be assigned based on the three month portion of the imprisonment sentence that was not suspended.

61. **QUESTION:** The defendant is awaiting sentencing in federal court on two unrelated "guideline" convictions. Does the court treat each conviction individually and compute a separate guideline range for each case?

ANSWER: No. The multiple counts rules are applied to separate indictments consolidated for sentencing. (See Commentary to §5G1.2.) The same procedure is used when an indictment has been transferred via Rule 20 and is to be sentenced with another unrelated guideline conviction. The guidelines do not dictate the decision to consolidate separate indictments for sentencing. However, if the court decides to do so, the multiple count rules would apply and the separate indictments should be treated as if they were counts contained in a single indictment.

62. **QUESTION:** The defendant was sentenced in state court to five years imprisonment for burglary. Before he began serving his imprisonment term, he was sentenced in the same

court to three years imprisonment for possession of cocaine to run concurrently with the burglary sentence. Are these two sentences considered related and therefore considered one sentence for purposes of assigning criminal history points?

ANSWER: No. Guideline 4A1.2(a)(2) directs that "prior sentences imposed in unrelated cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of the criminal history." Related cases are defined in Application Note 3 to §4A1.2 as cases that "(1) occurred on a single occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing." The example fits none of these circumstances. Therefore, the convictions would be considered "unrelated" and each would receive 3 criminal history points.

63. **QUESTION:** Does a conviction for simple possession of a controlled substance qualify as a "controlled substance offense" within the meaning of the career offender guideline?

ANSWER: No. A conviction for possession of a controlled substance does not meet the definitional criteria of §4B1.2. Even if the real offense conduct involved trafficking in controlled substances, the career offender enhancement is applied only if the offense of conviction is for a "controlled substance offense" as defined by the guidelines. According to §4B1.2(2), the term "controlled substance offense" means an offense "under a federal or state law prohibiting the manufacture, import, export, or distribution of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, or distribute." This definition does not include simple possession.

64. **QUESTION:** If the defendant has two prior felony convictions for crimes of violence but received probationary sentences on each, can these prior sentences be considered in determining career offender status?

ANSWER: Yes. For purposes of applying the career offender guideline, the prior felony convictions need not have resulted in sentences of imprisonment. Probation sentences counted under §4A1.1(c) may be considered prior convictions for determination of career offender status provided that they are felony convictions and meet the definition of crime of violence or controlled substance offense.

65. **QUESTION:** What is the standard of evidence used by the court to settle disputed factors as outlined in §6A1.3, Resolution of Disputed Factors?

ANSWER: Prior to implementation of the guidelines, the U.S. Supreme Court held in McMillan v. Pennsylvania that a preponderance of the evidence standard satisfied constitutional due process requirements at sentencing. The decided trend among courts of appeals decisions is that this standard is also adequate for guideline application purposes. See, e.g., United States v. Wright, 873 F.2d 473 (1st Cir. 1989); United States v. Guerra, 888 F.2d 247 (2nd Cir. 1989); United States v. McDowell, 888 F.2d 285 (3d Cir. 1989); United States v. Urzaga-Linarrs, 879 F.2d 1234 (4th Cir. 1989); United States v. Casto, 889 F.2d 562 (5th Cir. 1989); United States v. Barrett, 890 F.2d 885 (6th Cir. 1989); United States v. White, 888 F.2d 490 (7th Cir. 1989); United States v. Gooden, 892 F.2d 725 (8th Cir.

1989); United States v. Howard, 894 F.2d 1085 (9th Cir. 1990); United States v. Kirk, 894 F.2d 1162 (10th Cir. 1990); United States v. Alston, 895 F.2d 1362 (11th Cir. 1990); United States v. Chandler, 894 F.2d 463 (D.C. Cir. 1990).

66. **QUESTION:** Under §4B1.2, definitions of terms used in the career offender guideline, what does the phrase "the date the defendant sustained a conviction" mean?

ANSWER: This phrase means the date the sentence was imposed, not the date the plea was accepted or the guilty verdict entered. As is the case in the criminal history section, point assignment is based on a prior sentence being imposed, not merely on the existence of a verdict or plea. (See §4B1.2, Application Note 4.)

67. **QUESTION:** In supervised release revocation cases, is the court bound by the original guideline range for the offense being revoked?

ANSWER: No. Upon revocation of supervised release under 18 U.S.C. § 3583(e), a court is required by virtue of the cross reference to 18 U.S.C. § 3553(a)(4) and (5), to consider any applicable sentencing guidelines and policy statements. The Commission has not yet issued revocation guidelines, but it has promulgated policy statements, effective November 1, 1990, that are specifically intended to guide courts in supervised release revocation decisions. The issuance of policy statements, which have their own sentencing ranges, should make clear that the Commission does not intend that courts impose a revocation sanction in accord with the guidelines applicable to initial sentencing decisions. Moreover, when revoking supervised release, the appellate courts have held that the statute does not require that courts observe the guideline range for the initial sentence. See United States v. Dillard, 910 F.2d 461 (7th Cir. 1990); United States v. Scroggins, _____ F.2d _____, No. 89-8910 (11th Cir. 1990).

68. **QUESTION:** Can the court impose a sentence to run concurrently to an unexpired term of imprisonment?

ANSWER: Yes. Guideline 5G1.3 requires the court to impose a consecutive term of imprisonment only when the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status). Otherwise, the court has discretion in determining whether the sentence on the instant offense should run concurrently or consecutively to the term of imprisonment the defendant is currently serving.

The Commentary to §5G1.3 suggests a possible procedure for determining whether to run counts consecutively or concurrently. The sentencing court may wish to apply the multiple count rules to the offense for which the defendant is currently serving a term of imprisonment and the instant offense. The resulting "mock" guideline range is compared to the actual guideline range for the instant offense. This procedure may assist the court in determining whether to run the instant sentence consecutively or concurrently.

Note: the Sentencing Reform Act of 1984 changed the provision of law that had been held to require federal courts to impose a consecutive sentence where the defendant was subject to any unexpired state term of imprisonment.

69. **QUESTION:** When the guidelines instruct the court to use the "underlying offense" to determine the base offense level, does this include the base offense level plus all specific offense characteristics for the underlying offense?

ANSWER: Yes. Guideline 1B1.5 states that "Unless otherwise expressly indicated, a reference to another guideline, or an instruction to apply another guideline, refers to the entire guideline, i.e., the base offense level plus all applicable specific offense characteristics and cross references." The instruction does not include Chapter Three adjustments.

70. **QUESTION:** Should criminal history points be assigned if the defendant was convicted of a local ordinance violation for simple assault?

ANSWER: Yes. Local courts in several jurisdictions adjudicate violations of ordinances that mirror state law. Where the conduct could have been prosecuted under state or local law, the fact that the conviction was obtained under a local ordinance should not result in the exclusion of the conviction from the criminal history score unless conviction under similar state law would also be excluded. The Commission envisions such exceptions to include zoning, nuisance, and leash law violations.

71. **QUESTION:** The Commission has amended the Guidelines Manual on several occasions, in some cases increasing offense levels or raising specific offense characteristics. Should courts use the guidelines in effect at the time of sentencing or those in effect at the time of the offense?

ANSWER: In general, the Guidelines Manual in effect at the time of sentencing is to be used, as directed by the 1984 Sentencing Reform Act. (See 18 U.S.C. § 3553(a)(4) and (5) and S. Rep. No. 225, 98th Cong., 1st Sess. 77-78 (1983).) It should be noted, however, that this directive, in some instances, may be constrained by constitutional prohibitions of the Ex Post Facto clause. In 1987, the United States Supreme Court unanimously ruled in Miller v. Florida, 482 U.S. 423, that the Ex Post Facto clause of the U.S. Constitution precluded use at sentencing of a more punitive Florida sentencing guideline amendment that took effect subsequent to the date the defendant committed the offense. It remains for the courts to decide whether the Miller holding extends to application of federal sentencing guideline amendments, which, unlike the Florida guidelines, are not enacted into law by the legislature and are applied in conjunction with a more flexible departure standard. See United States v. Suarez, 911 F.2d 1016 (5th Cir. 1990) (Ex Post Facto clause precludes application of amended U.S.S.G. § 1B1.3 to defendant whose offense occurred prior to the effective date of amendment because the amendment may increase the defendant's punishment).

If Miller is applicable to federal guideline amendments, it would appear to preclude application of amended guidelines in such a manner as to increase the guideline range after a crime has been committed. The focus of Miller, however, is not simply on the effect of a single amendment in isolation, but rather on the combined effect of all applicable amendments in a particular set of guidelines. If amendments are neutral or clarifying in nature, or if interaction of all applicable guideline amendments does not raise the bottom of the guideline range, a Miller prohibition is not implicated, even if a single amendment might be more onerous to a defendant.

While the Historical Notes and Appendix C are helpful in identifying provisions of the Manual that have been the subject of amendment, they are not intended to suggest an amendment-specific approach to an Ex Post Facto analysis. If Miller is applicable, it may be necessary to compare the sentencing range calculated with all the guidelines in effect at the time of sentencing with the sentencing range calculated using all the guidelines in effect at the time of the offense. Following this approach, the lower of the two ranges would be used. While this procedure will be unnecessary in the majority of cases, it may be required in some multiple count cases where amendments raise the offense level for one offense while lowering it for another. It could also be necessary in cases in which changes to an offense conduct guideline in Chapter Two are offset by amendments to a Chapter Three adjustment or a criminal history provision in Chapter Four.

This procedure is not appropriate in multiple count cases in which the offense conduct in one or more counts was completed after the effective date of guideline amendments, while the conduct in other counts preceded the amendments' effective date. In such cases, the Guidelines Manual in effect at the time of the most recent count of conviction should be applied to the defendant's offense conduct in its entirety (whether or not the counts are aggregatable under U.S.S.G. §3D1.2(d)). For example, in sentencing a defendant in January 1991 convicted of three counts of bank robbery, one of which occurred on November 1, 1990, and the other two of which occurred in October 1988, the November 1990 Guidelines Manual should be used for all counts.

72. **QUESTION:** If the probation officer does not find that the defendant has demonstrated a recognition and affirmative acceptance of personal responsibility, must he or she nevertheless recommend a 2-level reduction when there is a plea agreement that stipulates that the defendant has accepted responsibility for the offense of conviction?

ANSWER: No. Rule 32(c)(2) states that the presentence investigation shall contain "the classification of the offense and of the defendant under the categories established by the Sentencing Commission pursuant to § 994(a) of title 28, that the probation officer believes to be applicable to the defendant's case..." Neither the probation officer nor the court is bound by a stipulation of guideline factors by the parties.

73. **QUESTION:** Is the determination of a role in the offense adjustment under Chapter Three, Part B, based on the defendant's relevant conduct in conspiracy cases?

ANSWER: Yes. The first sentence in §1B1.3(a) states that adjustments in Chapter Three shall be determined on the basis of information within the scope of relevant conduct. Therefore, the real offense parameters of relevant conduct are used to determine the defendant's role in the offense of conviction.

The Introductory Commentary to Chapter Three, Part B, clarifies that a defendant's role in the offense is to be assessed on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct), and not solely on the basis of elements and acts encompassed within the count(s) of conviction. For example, a defendant convicted of the offense of managing a "crack house" (§2D1.8) does not automatically receive an aggravating role adjustment. The crack house manager must have actually organized, led, managed, or supervised others in the course of running the establishment in order to apply an aggravating role adjustment under §3B1.1.

The Introductory Commentary also clarifies that where the defendant has received mitigation by virtue of being convicted of an offense significantly less serious than his actual criminal conduct, a further reduction in the offense level under §3B1.2 (Mitigating Role) ordinarily is not warranted. For example, where the defendant is convicted of simple possession, the defendant must have actually played a lesser role in the simple possession offense in order to receive a reduction for mitigating role.

74. **QUESTION:** Are prior uncounseled convictions considered invalid convictions and therefore not countable under criminal history?

ANSWER: Not necessarily. If a conviction was constitutionally invalid, it is not counted in the criminal history score. (See §4A1.2, Application Note 6.) However, the fact that a conviction was uncounseled does not automatically mean that the conviction was constitutionally invalid. In the case of a felony or misdemeanor, for example, the defendant may have waived counsel. Or, in the case of a misdemeanor, a term of imprisonment may not have been imposed and thus provision of counsel would not have been constitutionally required. The Background Commentary to §4A1.2 expressly states the Commission's intent that prior sentences not otherwise excluded are to be counted in the calculation of the defendant's criminal history score, including uncounseled misdemeanors where imprisonment was not imposed. See *United States v. Eckford*, 910 F.2d 216, *reh'g. en banc denied*, 1990 U.S. App. LEXIS 17035 (5th Cir. 1990) (prior uncounseled but valid misdemeanor convictions may be counted in criminal history score).

Appellate courts have held that evidence of a standard practice or customary procedure in a particular jurisdiction can be used to establish the probable constitutional validity of a prior conviction. Courts have also held that the defendant must carry the burden of establishing the invalidity of a prior conviction when the government demonstrates habit and custom that meet constitutional standards. See, e.g., *United States v. Dickens*, 879 F.2d 410 (8th Cir. 1989); *United States v. Davenport*, 884 F.2d 121 (4th Cir. 1989). See also *United States v. Newman*, ___ F.2d ___, No. 89-50503 (9th Cir. 1990) (for purposes of determining criminal history score, government has initial burden to prove fact of prior conviction; defendant has burden to establish constitutional invalidity of prior conviction; standard of proof is preponderance of evidence).

75. **QUESTION:** Does the government have the burden of persuasion in resolving guideline application disputes when the guideline adjustment would enhance (aggravate) the sentence? Likewise, does the burden of persuasion rest with the defendant if the adjustment would reduce (mitigate) the sentence?

ANSWER: Generally yes. The Commission notes court decisions holding that the burden of persuasion in resolving guideline application disputes rests with the government if the guideline adjustment would enhance the sentence and with the defendant if the adjustment would reduce the sentence. See, e.g., *United States v. McDowell*, 888 F.2d 285 (3rd Cir. 1989); *United States v. Urrego-Linares*, 879 F.2d 1234 (4th Cir. 1989); *United States v. Wilson*, 884 F.2d 1355 (11th Cir. 1989); *United States v. Kirk*, 894 F.2d 1162 (10th Cir. 1990); *United States v. Rodriguez*, 896 F.2d 1031 (6th Cir. 1990). However, this does not prevent the sentencing judge from taking an independent position that would result in a sentence adjustment (enhancement or reduction) that was not argued by either party.

76. **Question:** When determining the base offense level under §2K1.4 (Arson), is the risk posed to firefighters to be considered?

Answer: Yes. This guideline was amended effective November 1, 1990. A new Application Note 2 was added to clarify that "[c]reating a substantial risk of death or serious bodily injury includes creating a risk to firefighters and other emergency and law enforcement personnel who respond to or investigate an offense."

77. **Question:** Is there an analogous guideline for distribution of anabolic steroids?

Answer: No. As stated in Application Note 4 to §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product), the Commission has not promulgated a guideline for violations of 21 U.S.C. § 333(e) (offenses involving anabolic steroids). The provisions of §2X5.1 (Other Offenses) are controlling in such a case.

78. **Question:** The defendant was convicted of sexually exploiting a minor (18 U.S.C. § 2251). Guideline 2G2.1 has been applied. Is the Chapter Three adjustment for vulnerable victim applied due to the victim's young age?

Answer: No. Certain guidelines for sex offenses in Chapter Two, Parts A and G, consider the victim's young age through the base offense level and specific offense characteristics. Application Note 2 to §3A1.1 (Vulnerable Victim) instructs that this adjustment should not be applied where the Chapter Two offense guideline already provides an enhancement for the age of the victim.

79. **Question:** The defendant flushed cocaine down the toilet immediately before being arrested by the DEA. Does §3C1.1 (Obstructing or Impeding the Administration of Justice) apply?

Answer: Generally, no. This guideline was amended effective November 1, 1990. Application Note 3 to §3C1.1 instructs that destroying evidence contemporaneously with arrest may only be counted if such conduct results in a material hindrance to the official investigation or prosecution of the instant offense or to the sentencing of the offender. "Material" is defined in Application Note 5 to §3C1.1.

Less serious forms of obstructive behavior that do not warrant this enhancement ordinarily can appropriately be sanctioned by sentencing at the upper end of the otherwise applicable guideline range. (See Application Note 2.)

80. **Question:** Is a defendant who pleads guilty automatically entitled to a reduction for acceptance of responsibility?

Answer: No. Application Note 3 to §3E1.1 states that a defendant who pleads guilty prior to the commencement of trial and offers truthful admission of his involvement in the offense has provided significant evidence of acceptance of responsibility. A guilty plea by itself,

however, only provides some evidence of acceptance of responsibility and does not automatically entitle the defendant to a reduction. (See Background Commentary to §3E1.1.)

81. Questions: When is the Typical Weight Per Unit Table in §2D1.1 to be used?

Answers: As instructed in Application Note 11 to §2D1.1, the Typical Weight Per Unit Table is to be used only if the number of doses, pills, or capsules but not the weight of the controlled substance is known. For example, if the defendant is convicted of conspiracy to distribute 100 "hits" of methamphetamine but there is no actual methamphetamine to weigh, the table is used to calculate the weight (i.e., 100 doses at 5 mg. per dose = .5 gm. of methamphetamine).

For controlled substances marked with an asterisk (e.g., methamphetamine), the table provides a very conservative estimate of the total weight, as the weight shown only reflects the weight of the actual controlled substance and not the weight of the mixture or substance containing the controlled substance. In the example above, the calculated .5 gm. of methamphetamine would not include the weight of the capsule containing the methamphetamine or the cutting agent mixed with the methamphetamine.

82. Questions: Can a defendant convicted under 18 U.S.C. § 924(e) (armed career criminal) receive a guideline sentence greater than the mandatory minimum of 15 years imprisonment?

Answers: Perhaps. Guideline 4B1.4 (Armed Career Criminal), effective November 1, 1990, applies to those defendants subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e). This statute provides a mandatory minimum sentence of imprisonment of at least 15 years for a defendant who violates 18 U.S.C. § 922(g) and has three prior convictions for either a violent felony or a serious drug offense. Guideline 4B1.4 provides for a range of sentences to reflect the varying severity of the offense conduct and criminal history of such defendants.

83. Questions: Does fleeing from arrest warrant a 2-level enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice)?

Answers: No. As of November 1, 1990, Application Note 4(d) to §3C1.1 instructs that this type of typically less serious obstructive behavior does not warrant an enhancement under this guideline, but ordinarily can appropriately be sanctioned by sentencing at the middle or upper end of the guideline range.

However, as of November 1, 1990, a new guideline §3C1.2 (Reckless Endangerment During Flight) provides a 2-level increase "[i]f the defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer" (e.g., during a high speed chase).

84. Questions: Guideline 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition) provides cross references to the underlying offense. Are the cross references

to be applied even if the defendant has been convicted and sentenced on the underlying offense in state court?

Answer: Yes. As stated in the Background Commentary to §2K2.1, the firearm statutes are often used as a mechanism to allow the federal court to exercise jurisdiction over offenses that otherwise could be prosecuted only under state law. The cross reference is designed to handle such situations.

There are several mechanisms built into the guidelines to avoid double counting in such cases. First, the state conviction would not be counted in the calculation of the criminal history score. The term "prior sentence" is defined in §4A1.2(a)(1) as "any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere* for conduct not part of the instant offense." In this case, the prior state conviction would be part of the instant offense and thus would not meet the definition of "prior offense" for the purposes of applying criminal history points.

Second, if the instant offense was not committed while the defendant was serving a term of imprisonment, the Commentary to §5G1.3 instructs that the court may run the sentence for the instant federal offense concurrently to the state offense that the defendant is presently serving.

85. **Question:** How do the grouping rules apply to multiple counts of felon in possession of a firearm (18 U.S.C. § 922(g))?

Answer: It depends on the facts specific to each case and whether or not there are any underlying offenses. For example, if the defendant is convicted of multiple counts of felon in possession and the offense conduct involved only the possession of several weapons on the same occasion without an underlying offense, the counts would be grouped together pursuant to §3D1.2(a). Grouping rule (a) states that counts are to be grouped if the offenses involved the same victim (or societal harm) and the same act or transaction.

If the defendant is convicted of multiple counts of felon in possession and the offense conduct involved either the same gun or different guns being possessed on different occasions, the decision to group will depend primarily on the nature of any underlying offense. For example, if the defendant was merely possessing the weapons on both occasions and there were no underlying offenses, the counts would be grouped together pursuant to §3D1.2(b). Grouping rule (b) states that counts are to be grouped when the counts involve the same victim (or societal harm) and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

Due to the cross references at §2K2.1(c), in some cases a different guideline will be used if the offense level for the underlying offense is greater than that determined through application of §2K2.1(a) and (b). If, however, the cross references do not apply because the adjusted offense level at §2K2.1 is greater than that of the underlying offense, the decision to group will depend upon whether the underlying offenses meet the provisions of the §3D1.2 grouping rules. For example, if the defendant was only convicted of two counts of felon in possession but the defendant used a gun in connection with transporting stolen property on one occasion and used the same or different gun on another occasion in a separate instance of criminal trespass, the decision to group will be based upon whether these offenses are groupable. In this scenario,

the two counts of falsity in possession would not be grouped because the underlying offenses are not groupable.

86. **Questions:** The defendant was convicted of 31 U.S.C. § 5316 for having failed to declare that he was carrying more than \$10,000 when crossing the border from Canada into the United States. The money was to be used to buy clothing in New York for resale in Canada. When calculating the base offense level at §2S1.3 (Failure to Report Monetary Transactions), does subsection (a)(1)(B) or (a)(2) apply?

Answers: In this case, the defendant's verbal misrepresentation constituted commission of the offense in one of its simplest forms. The Background Commentary to §2S1.3 states that the lower base offense level of 5 at subsection (a)(2) applies to those offenses involving simple recordkeeping or other minor technical violations by defendants who reasonably believe that the funds at issue emanated from legitimate sources.

In order for the base offense level of 13 at subsection (a)(1)(B) to be applicable, the defendant must have made false written statements to conceal or disguise the evasion of reporting requirements. These false written statements must have been more sophisticated than a "simple recordkeeping or other more minor technical violation." Therefore, in this example, the lower alternative base offense level at subsection (a)(2) would be applicable.

87. **Questions:** Should a term of supervised release be ordered for a defendant convicted solely of 18 U.S.C. § 924(c)?

Answers: Yes. Application Note 3 to §2K2.4 states that the imposition of a term of supervised release is governed by the provisions of §5D1.1 (Imposition of a Term of Supervised Release).

88. **Questions:** The defendant is a sheriff convicted of extortion, an offense covered by §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right). Subsection (b)(2)(B) provides an 8-level increase if the offense involved a bribe for the purpose of influencing an elected official or any official holding a high level decision-making or sensitive position. Does this subsection apply to both the official who receives a bribe as well as the person who bribes the official?

Answers: Yes.

89. **Questions:** In a case involving one count of tax evasion and another count embodying criminal conduct that generated the income on which tax was evaded, can the tax evasion count be grouped with the underlying offense?

Answers: Yes. The counts can be grouped under §3D1.2(c). Grouping rule (c) instructs that counts are to be grouped when one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts. Specific offense characteristic (b)(1) at §2T1.1 (Tax Evasion) provides an enhancement if the defendant failed to report or to correctly identify the source of income exceeding \$10,000

in any year from criminal activity. Tax evasion is always grouped with the underlying offense according to rule (c), regardless of whether (b)(1) was actually applied.

90. **Question:** The defendant was convicted of drug distribution (21 U.S.C. § 841), felon in possession of a firearm (18 U.S.C. § 922(g)), and use of a weapon during a drug trafficking offense (18 U.S.C. § 924(c)). The two firearms forming the basis of the weapons counts were both used in the drug distribution scheme. How would these counts be grouped?

Answer: Guideline 3D1.1 instructs that counts carrying mandatory consecutive sentences, such as the 18 U.S.C. § 924(c), are exempted from operation of the grouping rules. Application Note 1 to §3D1.2 and Application Note 2 to §2K2.4 instruct that, in such a case, the specific offense characteristic for weapon use in the drug distribution count (§2D1.1(b)(1)) should not be applied because this behavior will be adequately sanctioned by the five year mandatory consecutive sentence required under 18 U.S.C. § 924(c).

The guidelines view the penalty for the 924(c) conviction as a sanction for all relevant conduct involving gun possession. Thus, the count for felon in possession (§2K2.1) should be artificially grouped with the 924(c) count to form a "pseudo count group" that is exempted from operation of the grouping rules.

91. **Question:** The defendant was convicted of one count of theft and one count of fraud. These counts are groupable under the provisions of §3D1.2(d). The defendant obstructed justice on the theft count but not on the fraud count. Does the defendant receive a 2-level enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice)?

Answer: Yes. Subsection (b) of §3D1.3 (Offense Level Applicable to Each Group of Closely-Related Counts) instructs that when counts grouped according to §3D1.2(d) involve offenses of the same general type to which different guidelines apply (e.g., theft and fraud), the offense guideline that produces the highest offense level should be applied. Application Note 3 to §3D1.3 states that specific offense characteristics from Chapter Two and adjustments from Chapter Three, Parts A (Victim), B (Role), and C (Obstruction) are to be applied based upon the combined offense behavior taken as a whole. Thus, the dollar amounts from the theft and fraud should be added and the 2-level enhancement for obstruction (§3C1.1) should be applied to both §2B1.1 (Theft) and §2F1.1 (Fraud) when determining which guideline produces the highest offense level.

92. **Question:** What does the term "otherwise accountable" mean at §1B1.3(a)(1)?

Answer: As explained in Application Note 1 to §1B1.3 (Relevant Conduct), "otherwise accountable" refers to conduct that the defendant counseled, commanded, induced, procured, or willfully caused.

In the case of criminal conduct undertaken in concert with others, conduct for which the defendant would be "otherwise accountable" also includes conduct of others in furtherance of the execution of the jointly undertaken criminal activity that was reasonably foreseeable by the defendant. Standing alone, the fact that the conduct of others was reasonably foreseeable to the defendant does not make the defendant otherwise accountable for that behavior.

93. **Question:** The defendant was convicted of possession with intent to distribute marihuana and hashish. The hashish was mixed in with the marihuana for a combined weight of 1 kilogram. How do I calculate the base offense level?

Answer: The footnote to the Drug Quantity Table in §2D1.1(c) designated by a single asterisk instructs that if a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level. In this case, since 1 kilogram of hashish results in a base offense level of 12 and 1 kilogram of marihuana results in a base offense level of 10, the base offense level for the entire mixture is level 12.

94. **Question:** Can tax evasion (§2T1.1) be grouped with fraud (§2F1.1) pursuant to §3D1.2(d)?

Answer: No. Although fraud (§2F1.1) and tax evasion (§2T1.1) are both listed as "aggregatable" offenses under §3D1.2(d), these two counts may not be grouped together under this rule. Guideline 3D1.3 (Offense Level Applicable to Each Group of Closely-Related Counts) states that when counts are groupable under §3D1.2(d) and the counts involve offenses of the same general type to which different guidelines apply (e.g., theft and fraud), apply the offense guideline that produces the highest offense level.

The fraud table and the tax table are driven by different guideline definitions of "loss." Thus, tax evasion and fraud are not "of the same general type," and therefore may not be grouped according to rule (d). This does not, however, preclude grouping under another rule.

95. **Question:** The defendant was convicted of RICO (18 U.S.C. § 1962). How is the alternative base offense level at §2E1.1(a)(2) determined?

Answer: Application Note 1 to §2E1.1 instructs that where there is more than one underlying offense (i.e., predicate act), treat each underlying offense as if contained in a separate count of conviction for the purposes of subsection (a)(2). The RICO count is to be treated as if it were a conspiracy count. (See §1B1.2(d) and Application Note 5). Each of the underlying offenses, whether or not charged in substantive counts of conviction, are treated as if they were substantive counts of conviction, or "pseudo counts."

Application Note 1 to §2E1.1 also states that to determine whether subsection (a)(1) or (a)(2) results in the greater offense level, apply Chapter Three, Parts A, B, C, and D to both (a)(1) and (a)(2). For example, if there were three "pseudo counts" of residential burglary, each having an offense level of 17 and no adjustments from Chapter Three, Parts A, B, or C, subsection (a)(2) would produce an offense level of 20 after applying Chapter Three, Part D, while subsection (a)(1) would produce an offense level of 19. In many instances, the determination as to whether subsection (a)(1) or (a)(2) will result in the higher offense level is obvious, making this comparative calculation unnecessary. If the higher offense level is determined through application of (a)(2), do not apply these Chapter Three adjustments a second time.

96. **Question:** The defendant has a prior conviction for driving under the influence of alcohol. Does this sentence count for the purpose of calculating the criminal history score?

Answer: Yes, provided it falls within the applicable time frames (§4A1.2(d) and (e)). Application Note 5 to §4A1.2 states that such convictions are not minor traffic infractions within the meaning of §4A1.2(c).

97. **Question:** The defendant has a prior conviction for which he was sentenced to "time served." Does this time in custody count for the purposes of applying criminal history points?

Answer: Yes. The amount of time served should be considered when determining the length of the prior sentence of imprisonment under §4A1.1(a), (b), or (c).

98. **Question:** The defendant has a guideline range of 8-14 months. Can the minimum of the guideline range be satisfied by ordering the defendant to serve the entire eight months in community confinement?

Answer: No. Under the "split sentence" option described at §5C1.1(d), at least one-half of the minimum term must be satisfied by imprisonment without benefit of the incarceration alternatives outlined in §5C1.1(e). The schedule of substitute punishments at §5C1.1(e) is only available to satisfy incarceration requirements imposed as a condition of probation or supervised release.

99. **Question:** Do the guidelines apply to a defendant who has been hospitalized for mental disease or defect under the provisions of 18 U.S.C. § 4244(d)?

Answer: No. However, if the defendant recovers and is resentenced under the provisions of 18 U.S.C. § 4244(e), the guidelines do apply.

100. **Question:** When calculating the alternative base offense level for §2H1.1(a)(2) (Conspiracy to Interfere with Civil Rights; Going in Disguise to Deprive of Rights), does "any underlying offense" include another civil rights offense?

Answer: No. Subsection (a)(2) refers to offenses other than a civil rights offense. As the second paragraph of the introductory commentary to Chapter H, Subpart One, points out, "[t]he addition of two levels to the offense level applicable to the underlying offense in this subpart reflects the fact that the harm involved both the underlying conduct and activity intended to deprive a person of his civil rights."

Application Note 1 to §2H1.1 instructs that if the defendant is convicted of conspiracy to interfere with civil rights, and the underlying offense was damage to property by means of arson, two levels would be added to the offense level determined under §2K1.4 (Arson; Property Damage by Use of Explosives). The offense level for the underlying offense would not be determined through application of §2H1.3 (Use of Force or Threat of Force to Deny Benefits or Rights in Furtherance of Discrimination; Damage to Religious Real Property), §2H1.4 (Interference with Civil Rights Under Color of Law), or §2H1.5 (Other Deprivations of Rights or Benefits in Furtherance of Discrimination).